Filed 8/17/09 Kalski v. Antonovich CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

STEVEN KALSKI, Plaintiff and Appellant, v. MICHAEL D. ANTONOVICH, as Supervisor, etc., et al., Defendants and Appellants; CALIFORNIA ASSOCIATION OF PROFESSIONAL EMPLOYEES, Defendant and Respondent.	B208252 (Los Angeles County Super. Ct. No. BS105860)

APPEALS from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Steven Kalski, in pro. per., for Plaintiff and Appellant.

Raymond G. Fortner, Jr., County Counsel, Manuel A. Valenzuela, Jr., Assistant County Counsel, and Monica M. Mauricette, Deputy County Counsel, for Defendant and Appellant Los Angeles County Employee Relations Commission.

Hausman & Sosa, Jeffrey M. Hausman, and Larry D. Stratton for Defendants and Appellants Michael D. Antonovich and Rick Auerbach.

Kohanski Adelstein & Dickinson, Ira L. Gottlieb, and Bush Gottlieb Singer Lopez for Defendant and Respondent California Association of Professional Employees.

The Los Angeles County Assessor fired Steven Kalski because he failed to do his job. Kalski filed an administrative proceeding before the Los Angeles County Employee Relations Commission (ERCOM), claiming that he had been terminated in retaliation for exercising his protected right to assert workplace grievances. ERCOM ruled against Kalski in his administrative case, which brings us to the cause before us today. After he lost his administrative case in the ERCOM forum, Kalski filed a joint petition for writs of administrative and traditional mandate, further joined with a civil complaint for damages. The trial court entered a judgment providing Kalski with a partial remedy on his petition for writ relief — a remand for further administrative proceedings in the ERCOM forum. No one is happy; everyone appeals. We affirm the trial court's judgment.

FACTS

In October 1989, the Assessor hired Kalski as an appraiser. (*Kalski v. California Association of Professional Employees* (Jan. 10, 2001, B132350) [nonpub. opn.] at p. 2.) In 1993, Kalski filed an administrative claim with ERCOM (UFC No. 70.47), challenging a seniority list compiled by the Assessor. ERCOM ruled against Kalski's administrative "seniority list" claim. In October 1994, Kalski filed a civil action in the superior court against the Assessor, ERCOM, and his union, the California Association of Professional Employees (CAPE). Kalski's pleading "was styled both a petition for writ of mandate and a complaint," and, reduced to its essence, set forth an attempt to allege tort, statutory, constitutional and contract-based wrongs arising from the Assessor's compilation of the seniority list, and ERCOM's failure to rule in his favor on his administrative challenge to the seniority list. (*Kalski, supra,* B132350 [at pp. 2-3].) In May 1999, the trial court entered a judgment on the pleadings against Kalski, and, in January 2001, Division Four of our court affirmed the judgment, ruling that "all of the causes of action pled in [Kalski's] petition and complaint were defective as the trial court ruled." (*Id*. at p. 33.)

At some point in time while Kalski was pursuing his "seniority list" causes, the Assessor reassigned Kalski to a different office, with new job responsibilities, and Kalski responded by commencing another round of administrative and judicial proceedings. In June 1998, Kalski filed another administrative claim with ERCOM (UFC No. 70.157) in which he alleged that his reassignment had been motivated by harassment and retaliation. At the same time (June 1998), Kalski filed another civil action in the superior court, this time challenging the Assessor's decision to reassign him to a different position. Neither of these "wrongful reassignment" proceedings ended in favor of Kalski.

In January 1999, Kalski filed a civil action in the local federal district court against the Assessor. Kalski's federal lawsuit alleged that his reassignment had resulted from the Assessor's racial and religious discrimination. In less than a year, Kalski lost his federal lawsuit. In September 1999, the federal district court entered an order granting summary judgment in favor of the Assessor. The court's order provides: "Kalski argues that the criticisms of [his work by] the Assessor's Office were unjustified and therefore pretextual. [¶] . . . [I]t appears to the Court that there is no issue of material fact on this score. Kalski has provided no admissible, relevant evidence to support his allegation that his transfer . . . was unjustified. He has provided no admissible, relevant evidence to support his allegation that his reassignments included more 'low value' areas than any other worker. [¶] In addition, the Court has reviewed Kalski's work, and any reasonable fact-finder would conclude that the Assessor's Office could reasonably label Kalski's work messy. Moreover, . . . the undisputed evidence demonstrates that Kalski regularly [violated] County policy. . . . [N]o reasonable fact-finder could find that Kalski was permitted to ignore the County's policy."

On April 23, 2001, the Assessor fired Kalski.

On July 2, 2001, Kalski filed his most recent administrative claim with ERCOM (UFC No. 70.200). Kalski's administrative case UFC No. 70.200 is the genesis for the appeal before us today. Kalski's claim in administrative case UFC No. 70.200 alleged that the Assessor had terminated him in retaliation for his prior, sundry administrative and judicial proceedings, and that CAPE had not properly responded to the Assessor's

employment action. In other words, Kalski essentially alleged the Assessor terminated him for exercising his protected right to assert his workplace grievances. Administrative case UFC No. 70.200 was assigned to ERCOM Hearing Officer Jan Stiglitz.

In November 2004, CAPE filed a written motion in Kalski's administrative case UFC No. 70.200, requesting an order directing Kalski to submit a "bill of particulars" which explained the factual basis for his claims against the union. (See ERCOM Rule 6.06(b).) At the same time, the Assessor filed its own motion for a bill of particulars from Kalski. In December 2004, Hearing Officer Stiglitz granted both motions, and directed Kalski to provide bills of particulars to CAPE and the Assessor. On February 14, 2005, Kalski served and filed a document entitled: "December 16, 2004 Ordered Responses to CAPE's and Assessor's Motions for Bills of Particulars (With Objections)."

On March 17, 2005, CAPE filed a written motion in Kalski's administrative case UFC No. 70.200, seeking dismissal of the proceeding on the ground that Kalski's bill of particulars had failed to state a cognizable claim against the union, and on the ground that his claims, such as they were, were barred by res judicata. On March 21, 2005, the Assessor filed a motion for dismissal of Kalski's administrative case UFC No. 70.200 on the ground that his bill of particulars had failed to state a cognizable claim against the Assessor, and on the ground that ERCOM did not have jurisdiction to hear Kalski's claims, such as they were, because the claims were untimely and/or did not involve an "unfair labor practice" with the meaning of the Employee Relations Ordinance (ERO).

On May 23, 2005, Hearing Officer Stiglitz heard arguments on the motions for dismissal of Kalski's administrative case UFC No. 70.200. On June 27, 2005, Stiglitz issued an extensive written ruling which set forth his reasons for granting the motions for dismissal filed by CAPE and the Assessor. Stiglitz's written decision shows that he addressed the motions to dismiss filed by CAPE and the Assessor as though they actually were, in substance if not in form, "motions for summary judgment and/or adjudication," and that, so construed, he granted the motions for summary judgment because Kalski had failed to show the existence of any disputed evidence requiring the fact-weighing

procedures of an evidentiary hearing. On September 25, 2006, ERCOM adopted Stiglitz's ruling, and entered a formal administrative order dismissing Kalski's administrative case UFC No. 70.200.

On October 30, 2006, Kalski commenced the current action by filing a "pleading" against the Assessor, CAPE, and ERCOM. Generously construed, Kalski's initial filing attempted to allege a petition for writ of administrative mandate joined with a civil complaint for damages. The respondents and/or defendants filed demurrers, arguing the pleading was uncertain. On March 21, 2007, the trial court (Hon. Dzintra Janavs) entered a minute order in which it noted that Kalski had been advised "that mandamus causes of action are decided on [an] administrative record by the court and [that] no live testimony [would] be taken and there [would] be no jury trial, and [that] the mandamus causes of action [would] be decided before any others." The court then ruled that Kalski's pleading was "uncertain, ambiguous and in parts, unintelligible," and sustained the demurrers, and granted Kalski leave to "file and serve [an] amended complaint/petition."

On May 25, 2007, Kalski filed *two separate* pleadings. One pleading was entitled a first amended complaint, and, reduced to its essence, alleged that ERCOM had violated Kalski's right to due process by providing a "defective" and unfair forum for addressing his underlying administrative claims in case UFC No. 70.200. The complaint prayed for more than $2.6 million in damages against ERCOM for the violation of his right to due process. Kalski's second pleading was entitled "First Amended Petition," and made references to Code of Civil Procedure sections 1094.5 (administrative mandate) and 1085 (traditional mandate). Kalski's writ petition, generously construed, alleged that he should have won his claims against the Assessor and CAPE in his underlying administrative case UFC No. 70.200 in the ERCOM forum.

At a hearing on July 9, 2007, the trial court (Hon. Dzintra Janavs) ordered that all proceedings on Kalski's civil complaint for damages were stayed until trial of his petition for writ of mandate.

On April 1, 2008, the trial court (Hon. James Chalfant) conducted trial on Kalski's writ petition, and took the matter under submission. On April 29, 2008, the trial court signed and entered a judgment which provides as follows:

> "1. With regard to [the Assessor] and ERCOM, a writ of administrative mandate shall issue from the Court, remanding the proceedings to . . . ERCOM, and commanding . . . ERCOM to set aside its decision of September 25, 2006, in the matter [of] UFC 70.200.
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> "2. The writ shall further command that . . . ERCOM reconsider the process and procedures by which it reaches its decision in this matter in light of the Court's determination that ERCOM's rules do not provide for a 'motion for summary adjudication.' This Order does not otherwise limit ERCOM's power to make substantive and procedural determinations as to the scope and nature of the administrative hearing, as long as it adheres to procedural due process and notice requirements.
>
> "3. It is further ordered, adjudged, and decreed that all causes of action and claims asserted by [Kalski], other than the claim arising under Code of Civil Procedure [section] 1094.5 are determined by the court to be moot, and are therefore dismissed, with prejudice.
>
> "4. It is further ordered, adjudged, and decreed that judgment is hereby entered in favor of [CAPE], and against . . . Kalski." (Capitalization omitted.)

Kalski filed a timely notice of appeal. ERCOM filed a timely notice of cross-appeal, as did the Assessor.

DISCUSSION

Kalski's Appeal

I. Kalski's Reliance on the Government Claims Act Does Not Show Error

Kalski contends he satisfied the claim filing procedure prescribed by Government Code section 905, "so that [he is] entitled to obtain jury calculation of the value of denied due process." We understand Kalski to be arguing that, because he filed a timely claim in the proper form (see Gov. Code, §§ 910, 911.2), he is entitled to a jury trial on his cause of action for damages as alleged in his civil complaint against ERCOM. The judgment signed and entered by the trial court on April 29, 2008, states that Kalski's civil claims for damages against ERCOM, all of which was based on an alleged violation of his state

and federal constitutional rights to due process in administrative case UFC No. 70.200, became "moot" upon his success on his petition for writ of administrative mandamus. In other words, we understand the trial court to have ruled that, because Kalski is entitled to further proceedings in the ERCOM forum in administrative case UFC No. 70.200, his claims arising from ERCOM's earlier, "defective" supervision of that case have become moot.

Although horribly scattershot, Kalski's arguments on appeal suggest to us that he presents the following issue for our consideration: When a governmental commission is charged with the task of determining workplace disputes (e.g., ERCOM), and that agency rules against a party based on bias rather than on the merits of a particular dispute, does the aggrieved party have a cognizable (and collateral) civil claim for money damages, or, alternatively, is the aggrieved party's sole remedy restricted to undoing the biased ruling?

The problem in addressing Kalski's issue (as we have framed it) is that he has not provided us with any legal authority demonstrating that the trial court got it wrong when it ruled that Kalski's remedy is a remand for further administrative proceedings in the ERCOM forum. In short, Kalski's failure to cite relevant legal authority in support of his assignment of error on appeal is, in-and-of-itself, fatal to his appeal. (*Kuperman v. San Diego County Assessment Appeals Bd. No. 1* (2006) 137 Cal.App.4th 918, 931 (*Kuperman*) [when an appellant fails to offer any legal authority to meet his or her burden of showing error, a reviewing court may deem the issue to be without foundation].) We decline to say anything more.

II. The Status of Kalski's Appraiser's Certificate Is Not Relevant

From the text of his opening brief, it appears Kalski argues that Hearing Officer Stiglitz in administrative case UFC No. 70.200 somehow violated his right to a protected "liberty interest," namely, his state-issued appraiser's certificate. (See Rev. & Tax. Code, §§ 670, 671.) We reject Kalski's contention because we do not understand how his argument fits into the context of his claim that he was the victim of a "retaliatory firing." In other words, Kalski does not explain how ERCOM is the proper forum to resolve matters related to the retention or revocation of a state-issued appraiser's certificate.

As Hearing Officer Stiglitz noted in his written ruling on the motions to dismiss filed by CAPE and the Assessor, Kalski's loss of his certificate — assuming that loss has actually occurred — may be a "collateral consequence" of his termination, but it did not expand the issues in administrative case UFC No. 70.200 beyond an examination of whether or not the Assessor's employment decisions and actions were proper.

III. The Doctrine of Res Judicata Is Not Relevant

It appears Kalski also argues Hearing Officer Stiglitz should not have ruled against him, and in favor of the Assessor and CAPE, based on the doctrine of res judicata. We reject Kalski's argument because it is based on a predicate that we do not see reflected in the record.

In his written decision granting the motions to dismiss filed by the Assessor and CAPE, Hearing Officer Stiglitz did refer to findings made in at least one of Kalski's prior legal proceedings — namely, Kalski's federal court action which ended with an order for summary judgment in 1999; but those references were merely contextual. As we read his decision on the motions to dismiss, Stiglitz did not deny Kalski's claims in administrative case UFC No. 70.200 on the ground they were barred by the doctrine of res judicata. On the contrary, Stiglitz's written decision on the motions to dismiss explained that the Assessor and CAPE were entitled to prevail against Kalski in administrative case UFC No. 70.200 because he had "failed to adduce any evidence which would support a claim that the Assessor retaliated against him," and because he had "failed to adduce any evidence which would support a claim of a violation of the [County's ERO]" by CAPE.

In short, Kalski did not lose his claims in administrative case UFC No. 70.200 based on the doctrine of res judicata; Kalski lost his administrative case because he did not present any evidence to support a conclusion that CAPE and/or the Assessor engaged in wrongdoing which would support a decision in Kalski's favor.

IV. Kalski Has Not Shown ERCOM Forum Bias

Insofar as we are able to discern from his opening brief, Kalski argues he lost his claims in administrative case UFC No. 70.200 because Hearing Officer Stiglitz was biased against him. We reject Kalski's arguments because they appear to be founded on

nothing more than his observations that Stiglitz made rulings that did not go in Kalski's favor. Such a showing is simply not sufficient to show that a decision-maker was biased. (*Andrews v. Agricultural Labor Relations Bd*. (1981) 28 Cal.3d 781, 795-796 [adverse rulings, standing alone, do not show bias].)

V. Kalski Has Not Shown a "Quorum" Error

Kalski also appears to argue there is a defect in the ERCOM's final decision in administrative case UFC No. 70.200 because ERCOM "lacked a quorum" when it adopted Hearing Officer Stiglitz's decision to grant the motions to dismiss the proceeding. We reject Kalski's argument because his contention that ERCOM lacked capacity to conduct business on the date that it adopted Stiglitz's decision is not supported by any citation to legal authority or any references to evidence in the record. (*Kuperman*, *supra*, 137 Cal.App.4th at p. 931.)

VI. The Trial Court's Tentative Ruling Is Not Defective

As best as we can determine, Kalski next argues the trial court's judgment must be reversed because of "defects in [the court's] tentative." We reject Kalski's argument because " 'it is what the court did, and not what the judge of the court stated during the course of the trial, that determines the course of our inquiry upon . . . appeal, as there is a vital distinction between what the judge of a trial court may say and what the trial court actually does.' " (*Diaz v. Schultz* (1947) 81 Cal.App.2d 328, 332.) We have in any event reviewed the complete text of the trial court's tentative ruling (dated April 1, 2008), and we do not see any "defects." It is a well-organized tentative ruling, which sets forth the trial court conclusions and reasoning for its decision. Generously construing his opening brief, it is more accurate to say that Kalski disagrees with the trial court's conclusions. A party's disagreement with a trial court's ruling does not mean there are "defects" in that ruling which make it legally ineffective.

VII. The Trial Court Adequately Explained the Reasons for Its Decision

From what we are able to determine from his opening brief, Kalski also argues the trial court "omitted bases" which would support a finding that ERCOM denied him due process — i.e., a fair hearing — in administrative case UFC No. 70.200. According to

Kalski, "[t]here are stronger bases for determining that ERCOM denied [him] due process than what was articulated by Judge Chalfant." Fairly construed, Kalski's argument seems to be that the evidence favoring his claim of bias was better than the evidence against his claim of bias. We reject Kalski's argument for two reasons. First, we do not reweigh evidence on appeal; that task belonged to the trial court. Second, we see nothing in Kalski's arguments to persuade us to overrule the trial court's conclusion that Kalski's due process claims are moot in light of the court's decision to remand administrative case UFC No. 70.200 back to ERCOM for further proceedings.

VIII. The Trial Court Adequately Addressed the Issues

Insofar as we can determine, it seems Kalski next argues the trial court's judgment must be reversed because the court did not — in a statement of decision under Code of Civil Procedure section 632 — address all of issues which were involved in the trial of his petition for writ of administrative mandate. As Kalski puts it: "My complaints about [an inadequate] administrative record and [the] lack of an ERCOM quorum were among [the] improperly disregarded issues." Kalski has not persuaded us to find any error.

A trial court need not, in a statement of decision, address all the legal and factual issues raised by a party; the trial court is only required to set out the facts and legal rules supporting its decision. (See, e.g., *Yield Dynamics, Inc. v. TEA Systems Corp*. (2007) 154 Cal.App.4th 547, 559.) The court's stated reasons for its decision — remanding Kalski's administrative cause back to ERCOM for further proceedings — are adequately laid out in its tentative ruling, which the court adopted as its statement of decision. And, upon the court's decision to remand the cause to ERCOM, Kalski's complaints about such things as the administrative record and the lack of a quorum became, as the trial court found, moot. Kalski's arguments on appeal are not sufficient to persuade us to assign error to the trial court's statement of decision.

IX. The Statute of Limitations Is Not Relevant to This Appeal

It seems Kalski also argues the trial court's judgment must be reversed because the court's analysis of the statute of limitations is infected with error. We summarily reject Kalski's argument because it is not relevant. The trial court did not reach the merits of

any substantive issues at the trial of Kalski's writ petition, including the statute of limitations. Instead, the court found that Hearing Officer Stiglitz had allowed the use of an unavailable procedure — a motion for summary judgment — to resolve Kalski's administrative case UFC No. 70.200, and, for this reason, remanded Kalski's cause back to ERCOM for further proceedings. As of now, the trial court did not deny Kalski's petition for a writ of administrative mandate based on the statute of limitations.

X. The Trial Court Properly Ruled in Favor of CAPE

In our reading of his opening brief, Kalski next argues the trial court's judgment must be reversed because CAPE should not have been excused from Kalski's petition for writ of administrative mandate.[1] If we understand his position correctly, Kalski contends he presented sufficient evidence in the ERCOM forum during administrative case UFC No. 70.200 to show that CAPE — acting by and through one of its agents, Mark McNeil — "actively participated" in the Assessor's retaliation.

We decline to reverse the trial court's judgment in favor of CAPE because we see nothing in Kalski's briefing to explain just what evidence it is that he actually presented against CAPE/McNeil. It is not sufficient for Kalski to *tell us* that he presented evidence tending to show that CAPE/McNeil are potentially liable, he has to *show us* the evidence he presented or we cannot assess whether his claim is accurate. In other words, we reject Kalski's argument because his presentation on appeal is simply insufficient to meet his burden on appeal to show the trial court erred.

XI. The Trial Court Properly Addressed Kalski's Writ Petition First

Insofar as we are able to ascertain, Kalski also argues the trial court (Hon. Dzintra Janavs) violated his due process rights when it ordered his petition for writ of administrative mandate to proceed to trial before his civil complaint. We reject Kalski's argument because none of the authorities he cites (see, e.g., *Volpicelli v. Jared Sydney Torrance Memorial Hosp.* (1980) 109 Cal.App.3d 242) support his idea that a trial court

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[1] CAPE was not a named defendant in Kalski's civil complaint.

does not have the authority and discretion to enter orders implementing the orderly management of litigation.

XII. Kalski Has Not Shown That the Administrative Record Was Deficient

From what we can ascertain from his opening brief, Kalski argues the trial court's judgment must be reversed because ERCOM failed to provide him with a complete record of the proceedings in administrative case UFC No. 70.200, thus keeping him from properly preparing and presenting his side at the trial of his petition for writ of administrative mandate. The problem with Kalski's argument is that he has not explained what was missing from the administrative record. Empty assertions do not establish error; Kalski has not shown error.

XIII. Kalski's Wrongful Termination Claims Are Not Cognizable on This Appeal

Insofar as we are able to ascertain from the text of his opening brief, Kalski argues the trial court's judgment must be reversed because it does not overturn Hearing Officer Stiglitz's decision in administrative case UFC No. 70.200 not to award him "the value of all unpaid wages and benefits from the time the [A]ssessor ceased making such payments on April 23, 2001." In other words, Kalski contends he should have won his "retaliatory termination" claims in administrative case UFC No. 70.200, and the trial court should have said so. We find Kalski's argument moot because the trial court has remanded his claims back to ERCOM for further proceedings in administrative case UFC No. 70.200. At best, Kalski's present contention is premature until there has been a final administrative decision.

XIV. Costs

Apparently, Kalski also asserts some form of error regarding taxing costs. We decline to address this issue because we see no documents of any kind in the appellate record dealing with costs.

ERCOM's Cross-appeal

ERCOM contends the trial court's judgment must be reversed because it leaves open the possibility that its language may be interpreted to include a finding that Kalski may be able to prevail on the merits of his underlying administrative case UFC

No. 70.200. ERCOM argues the trial court should have "clearly stated that [it] did not find for Kalski on the merits" of his petition for writ of administrative mandamus, and that the cause was being remanded to the ERCOM forum solely for the purpose of having Hearing Officer Stiglitz correct the form of his written decision granting the motions to dismiss filed by the Assessor and by CAPE. Insofar as we understand its position, ERCOM essentially wants the judgment to be limited to stating that Stiglitz must modify the dispositional language in his decision to include new language to the effect that CAPE's and the Assessor's motions to dismiss Kalski's administrative claims were "granted," not "summarily adjudicated."

We reject ERCOM's argument. We do not understand the trial court's judgment to contemplate mere semantic modifications of Hearing Officer Stiglitz's written decision to grant the motions to dismiss administrative case UFC No. 70.200. On the contrary, the trial court found that Stiglitz had utilized a procedure to resolve Kalski's administrative claims — a motion for summary judgment — that is not available under ERCOM's rules. As the court stated: "There is no authority in the ERCOM rules for a summary judgment motion." This strikes us as something more profound than a mere problem of semantics. The analogy that comes to our mind would be a trial court resolving a civil case without a trial, where there was no summary judgment statute in the Code of Civil Procedure.

We have looked in vain throughout ERCOM's briefs on appeal, and have not seen a citation to any ERCOM rule authorizing any kind of summary procedure for disposition of a grievant's claims in the ERCOM forum. If there is such a rule, then ERCOM should have directed us to the rule. As we see matters now, ERCOM simply has not convinced us to reverse the trial court's judgment.

The Assessor's Cross-appeal

The Assessor, complementing the position staked out by ERCOM's cross-appeal, argues ERCOM "was not required to hear oral testimony" in order to adjudicate Kalski's administrative case UFC No. 70.200. According to the Assessor, "ERCOM has greater power and authority than the trial court recognized" because its rules "do <u>not</u> require the

calling of witnesses and cross-examination." The Assessor's argument does not persuade us to reverse the trial court's judgment.

1. ERCOM's Rules

ERCOM Rule 6 prescribes the procedures under which it addresses a charge "that the County, an employee organization or [their] representatives or members, individually or in concert with others, have engaged in or are engaging in any unfair employee relations practice as defined in the [ERO]"[2] (Rule 6.01.) An ERCOM proceeding is initiated by the filing of a charge. (*Ibid*.) The charge must contain "[a] clear and concise statement of the acts constituting the charge and of the sections . . . of the [ERO] alleged to have been violated." (Rule 6.02.) Upon the filing of a charge, ERCOM is required to conduct a preliminary investigation and submit a report. (Rule 6.04.) ERCOM must then review the preliminary investigation report, and "may" direct a further investigation, or dismiss the charge in whole or in part, or process the charge as filed and set the matter for a hearing. (Rule 6.05.) After issuance of a notice of hearing, the respondent shall file an answer, and may file a motion for a bill of particulars. (Rule 6.06.)

2. The Assessor's Position

The Assessor cites Rule 6.07(a) in support of its contention that ERCOM was not required to hear testimony on Kalski's claims in administrative case UFC No. 70.200. Rule 6.07, in its entirety, proves:

> "a. Hearings shall be limited to argument and evidence on issues of fact or law material to the proceedings.
>
> "b. Parties . . . may appear at a hearing in person, by counsel or by other representatives; may call, examine and cross-examine witnesses; and may introduce into the record documentary or other evidence.
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> "c. The technical rules of evidence prevailing in the courts shall not be controlling.
>
> "d. The hearing officer may direct or permit the filing or briefs and/or proposed findings, conclusions and order.

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[2] All further rule references are to ERCOM's rules.

"e. Any party may file with the hearing officer a written application for the issuance of a subpoena requiring the attendance of a witness or the production of books or documents. The application shall name and identify the witness or the documents sought and the reason therefor. The hearing officer, at his discretion, shall issue such subpoena on a form provided by the Commission. The person served with a subpoena or any party to the action may file with the hearing officer a motion to revoke or modify. If any party files with the hearing officer such a motion, it shall also be served on the other parties named in the charge. The hearing officer shall rule on such motion. [¶] In the event an unusually large number of subpoenas are issued for employees from a work area, the loss of which employees may cause a serious impact on County operations, the hearing officer may designate an orderly schedule of appearances so as not to cause a negative impact on County operations.

"f. The hearing officer, upon failure of any party to comply with a subpoena, may disregard all related evidence offered by such party.

"g. All witnesses shall appear in person and shall be examined under oath or affirmation. The hearing officer shall have the authority to administer oaths and affirmations.

"h. Within five (5) days after receipt of the Notice of Hearing, any party may request the hearing officer to withdraw by filing an affidavit with the Commission setting forth in detail the matters alleged to constitute grounds for disqualification. If, in the opinion of the Commission, such affidavit is filed with due diligence and if upon due inquiry it is found sufficient, they shall disqualify him and he shall be withdrawn from the proceeding. If the Commission does not disqualify him, they shall so rule and the hearing shall proceed.

"i. An official reporter shall make the only official transcript of such proceedings. The parties may make their own arrangements with the official reporter for copies of such transcript."

Analysis

Contrary to the Assessor's interpretation, we see nothing in Rule 6.07(a) which suggests to us that ERCOM may dispense with testimony, and resolve a grievant's claims by a motion for summary judgment. On the contrary, we read Rule 6.07 to provide that, once ERCOM elects to set a matter for hearing (see Rule 6.05), some manner of evidentiary hearing is envisioned.

The Assessor's discussion of the "bill of particulars" procedure established under the Code of Civil Procedure does not persuade us to come to a different conclusion. We agree with the Assessor that Code of Civil Procedure section 454 grants a defendant in an action *on an account* the right to request a bill of particulars, and that a plaintiff's response legally limits the evidence and the recovery to the matters set forth in his or her bill. (See, e.g., *Banchero v. Coffis* (1950) 96 Cal.App.2d 717, 722; *Baroni v. Musick* (1934) 3 Cal.App.2d 419, 421.) But none of the cases cited by the Assessor hold that a deficient bill of particulars allows for summary disposition of a plaintiff's claims. On the contrary, it appears from the cases that a defendant's remedy when presented with an inadequate bill of particulars is to file a motion to preclude a plaintiff from presenting any evidence beyond what is set forth in his or her bill. (See, e.g., *Fisher v. Brotherton* (1927) 82 Cal.App. 532, 540.)

Although we are sympathetic to the position into which ERCOM and the Assessor were placed by Kalski's ramblings, we are satisfied that, once ERCOM set his claims for hearing, those charges could not be resolved by a motion for summary judgment. In the end, the Assessor has not persuaded us to reverse the trial court's judgment.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BIGELOW, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.